RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 13-339

IN THE

Supreme Court of the United States

CTS CORPORATION,

Petitioner,

v.

PETER WALDBURGER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

Respondents cannot and do not deny that there is a 2-2 division of authority on the question presented. As Respondents themselves recount (Br. in Opp. 12-13), the Ninth Circuit and the divided Fourth Circuit panel below have held that 42 U.S.C. § 9658 preempts state statutes of repose. *See McDonald v. Sun Oil Co.*, 548 F.3d 774, 779 (9th Cir. 2008); Pet. App. 16a. And, as Respondents also acknowledge (Br. in Opp. 9-11), the Fifth Circuit and the Supreme Court of South Dakota have held the opposite. *See Burlington N. & Santa Fe Ry. v. Poole Chem. Co.*, 419 F.3d 355, 362 (5th Cir. 2005); *Clark Cnty. v. Sioux Equip. Corp.*, 753 N.W.2d 406, 417 (S.D. 2008). Thus, this case poses a clear split on a recurring question of federal law.

Instead of disputing the existence of the 2-2 split, Respondents suggest that the split is not yet "meaningful" and that it should be left to "percolate." Br. in Opp. 9, 22. But there is no valid reason for delay. Both sides of the split have been well ventilated, as demonstrated by the thoroughly reasoned majority and dissenting opinions in the decision below. *Compare* Pet. App. 1a-18a (majority), *with* Pet. App. 19a-36a (dissent). Moreover, the split frequently controls liability in multi-million dollar civil suits, including in the present case. *See* Pet. App. 57a.

At bottom, Respondents simply disagree with the decisions forming one half of the split. That does not remotely justify delaying review. Indeed, delay is especially unwarranted here because this case affords an ideal vehicle. This case was decided on a motion to dismiss, and there is no dispute that, absent § 9658, Respondents' state claim would be eliminated

under North Carolina's statute of repose. The petition for a writ of certiorari should be granted.

I. THE 2-2 SPLIT ON THE QUESTION PRESENTED JUSTIFIES CERTIORARI

Unable to deny that there is a 2-2 division authority on the question presented, Respondents assert that the split is (somehow) not "meaningful"—even though it frequently controls liability in multi-million dollar CERCLA suits. Respondents' arguments are unconvincing.

A. At the outset, Respondents agree (Br. in Opp. 9-11) that the Fourth and Ninth Circuits interpreted § 9658 in the same way: both held that § 9658 preempts state statutes of repose, even though § 9658 mentions only statutes of limitation. *See McDonald v. Sun Oil Co.*, 548 F.3d at 779; Pet. App. 16a. Thus, the Fourth and Ninth Circuits indisputably form one side of the 2-2 split over the meaning of § 9658.

B. After trumpeting one half of the split (the one they like), Respondents try to downplay the other half. But the effort is unavailing.

1. Respondents first argue that the Fifth Circuit's decision in *Burlington*, 419 F.3d 355, supplies a "weak basis for review," Br. in Opp. 12, even though *Burlington* squarely conflicts with Fourth Circuit and Ninth Circuit precedent. Indeed, the decision below specifically noted that it was "join[ing] the view articulated by the Ninth Circuit" and that it was "unpersuaded" by the "opposing view" of the Fifth Circuit in *Burlington*. Pet. App. 16a. And while Respondents assert that *Burlington* should be narrowed to its facts, *see* Br. in Opp. 12-13, the Fifth Circuit did not

see it that way. Its decision rested on a clear rule: "[T]he reach of the plain language of § 9658 does not extend to statutes of repose," whatever the facts of any individual case. *Burlington*, 419 F.3d at 362. That clear holding controls the scope of § 9658 in the Fifth Circuit.

Respondents also complain that *Burlington* "failed to address" and "failed to discuss" arguments that Respondents themselves view as persuasive. Br. in Opp. 13. And Respondents further assert that the Fifth Circuit issued its decision with inadequate "briefing." *Id.* at 12. This kind of quibbling again misses the point. The Fifth Circuit's *Burlington* decision was thoroughly reasoned. Indeed, the Fifth Circuit's discussion of the question presented spanned five pages, *see Burlington*, 419 F.3d at 361-65, and was repeatedly relied on by the dissenting opinion below. *See* Pet. App. 22a-23a (Thacker, J., dissenting). And regardless, what matters is that the Fifth Circuit has taken a clear position in an acknowledged circuit split. Confirming as much, district courts in the Fifth Circuit have followed *Burlington*'s clear holding. *See, e.g.*, *Coleman v. H.C. Price*, No. 11-2937, 2013 WL 64613, at *2-*3 & nn. 13-14 (E.D. La. Jan. 4, 2013) ("[T]he reach of the plain language of § 9658 does not extend to statutes of repose" (quoting *Burlington*, 419 F.3d at 362-64)). Moreover, the Fifth Circuit has adhered to its position for over eight years. Certiorari is warranted.

Respondents also note (Br. in Opp. 20-21) the Fifth Circuit's decision in *Barnes v. Koppers, Inc.*, 534 F.3d 357, 365 (5th Cir. 2008). As Respondents observe, *Barnes* did not address statutes of repose and so did not speak to the question presented here. *See* Br. in

Opp. 21. Still, the reasoning of *Barnes* underscores an important point in favor of Petitioner's reading of § 9658. As *Barnes* noted, "we are to presume, absent manifest Congressional intent, that Congress did not intend broad preemption in the traditional field of state tort remedies." 534 F.3d at 365. That respect for traditional state prerogatives cuts strongly in favor of reading § 9658 not to apply to statutes of repose. *See infra* p. 7 (discussing the presumption against preemption).

2. Respondents next address the South Dakota Supreme Court's decision in *Clark County*, 753 N.W.2d 406, in which that court explicitly aligned itself with the Fifth Circuit. *See id.* at 414-17 (discussing *Burlington*, 419 F.3d at 355). As the South Dakota Supreme Court recognized, § 9658 applies only to state statutes of limitation, since Congress did not "include substantively different statutes of repose within this preemptive rule." *Id.* at 417. Even Respondents recognize that *Clark County* "followed *Burlington*" and "held that section 9658 did not preempt a state statute of repose." Br. in Opp. 13. Thus, *Clark County* joined *Burlington* on one side of the 2-2 division of authority at issue in this case.

Again unable to deny the existence of a split, Respondents resort to relitigating the merits. In particular, Respondents argue that the South Dakota Supreme Court "failed to analyze" particular arguments and that it should not even have reached the question presented. *See* Br. in Opp. 13. Again, Respondents miss the point. What matters for purposes of this Court's review is that the highest court of a state has concluded an issue of federal law in direct conflict with two federal courts of appeals. Respondents also

assert that the South Dakota Supreme Court could conceivably reverse its own precedent. *See* Br. in Opp. 13. So could the Fourth Circuit, or the Fifth, or the Ninth, some day. But for a long time now, the division has remained—and the instant decision only makes it worse. No further percolation is required. The time is now to resolve this crucial question.

In sum, the decision below explicitly joined sides in an acknowledged conflict of authority, with the Fourth and Ninth Circuits on one side and the Fifth Circuit and the South Dakota Supreme Court on the other. *See* Pet. 14-18. This clear 2-2 split warrants this Court's review.

II. CERTIORARI IS ALSO WARRANTED BECAUSE THE QUESTION PRESENTED IS IMPORTANT AND RECURRING

The Court should also grant CTS Corporation's petition because it raises an important and recurring legal issue. As Petitioners have explained, the question presented is litigated with great frequency in district courts. *See* Pet. 21 (discussing five federal district courts that have formed a 3-2 split over a single state statute of repose). But the enormous financial stakes—typically in the millions of dollars—frequently force settlement, thereby preventing many potential vehicles from reaching the courts of appeals at all. *See Id.* at 19-21. The result has been a significant federal intrusion into a paradigmatic area of traditional state regulation. *See id.*

Yet again, Respondents sidestep this important issue, and instead make the boilerplate point that disagreement among district courts is insufficient in itself to justify certiorari. Br. in Op. 14. True, but

again, beside the point. This division in the district courts—even in the same circuit—only underscores the confusion being caused by the fact that federal courts of appeals and state supreme courts *are* split 2-2 over the question presented. *See supra* pp. 2-5. Given that undisputed division of authority, both the practical importance of the question presented and the frequency with which it arises confirm that certiorari should be granted.

III. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S CASE LAW

Finally, certiorari is appropriate because the Fourth Circuit's decision conflicts with bedrock principles that this Court has directed lower courts to follow when interpreting federal statutes.

A. As Respondents themselves acknowledge, both the Fourth Circuit and the Ninth Circuits started with their preferred holding, drawn from a broad view of what they perceived as "CERCLA's legislative purpose," Br. in Opp. 9; *id.* at 19-20, then worked backward to justify rewriting the statute's text. That's not how statutory interpretation is supposed to work—indeed, it is doubly erroneous.

1. As this Court has repeatedly held, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam); *see also Kucana v. Holder*, 558 U.S. 233, 252 (2010). Statutes are the product of numerous cross-cutting legislative objectives, and the Congresses that enacted CERCLA and its later amendments clearly chose not to advance its remedial purpose in all pos-

sible ways. For example, Congress specifically rejected a number of remedial proposals advanced by the Study Group. *See* Pet. 26. Here, § 9658 furthers remedial purposes insofar as it preempts statutes of limitations. It does not go so far as to preempt statutes of repose, any more than it indiscriminately imposes CERCLA liability on any person who happens to occupy land adjacent to a CERCLA site. Both would advance broad remedial purposes; neither is the law. By allowing its own conception of statutory purpose to trump statutory text, the decision below contravened this Court's precedents.

2. The decision below also flouts the presumption against preemption—a settled rule of construction that Respondents do not even mention. *See, e.g.*, *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That presumption against preemption "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Even assuming that Respondents were correct that § 9658 is "ambiguous" as to the question presented, Br. in Opp. 9, that ambiguity should be resolved not by recourse to judicially guessed "purposes," but rather through application of settled canons of construction. Here, this Court's presumption against preemption dictates rejection of Respondents' position.

B. Tacitly recognizing that the decision below erred by elevating statutory purpose over statutory text, Respondents also offer pseudo-textual arguments not relied on by the decision below. In so doing, Respondents—unlike the decision below—

correctly recognize that "a statute's terms should be given the meaning that they had when the text was adopted," in 1986. Br. in Opp. 17. But there is a reason that the decision below did not rely on this mode of analysis: it's fatal to the majority's holding. For, as the dissent demonstrated, attention to historical context refutes Respondents' view of § 9658.

The consensus view when § 9658 was enacted was that the term "statutes of limitation" had a specific meaning. It referred to laws that extinguish a claimant's right to pursue a cause of action after a certain period of time following accrual. Given that consensus meaning, § 9658 does not apply to statutes of repose, which abolish causes of action after a period of time, regardless of whether a claim has accrued.

Respondents also raise various arguments purporting to show that the terms "statutes of repose" and statutes of limitation" are interchangeable. But, as one might guess from looking at how different these words appear on a page, these arguments are unpersuasive.

1. Respondents point to various judicial decisions that, in Respondents' view, use the term "statutes of repose" as an umbrella term that encompasses "statutes of limitation." *See, e.g.*, Br. in Opp. 17 (citing *United States v. Kubrick*, 444 U.S. 111, 117 (1979)). But this point misses the crucial context. What matters is not what the Norman French, the drafters of Magna Carta, or even Blackstone or Chief Justice Marshall would have thought on this score. What matters is the prevailing view *at the time* of § 9658's enactment. *See* Pet. 24-25. And, again, this is all really beside the point, because Respondents would not prevail *even if* the term "statutes of repose" were

read to encompass statutes of limitation. Because § 9658 refers to "statutes of limitation," the key issue is whether *that* term would have been read broadly to encompass statutes of repose in 1986. The overwhelming weight of evidence suggests that the answer is no. As Petitioners have explained, the term "statutes of repose" was once used as an umbrella term that encompassed statutes of limitation. *See* Pet 24. But, during the 1980s, the term "statutes of limitation" acquired a more specific meaning limited to laws that extinguished causes of action after the claim's accrual.

2. Perhaps most curiously, Respondents cite the 1979 edition of *Black's Law Dictionary*. Br. in Opp. 17. Again, Respondents entirely ignore the analysis in the dissenting opinion below, which showed that recourse to *Black's Law Dictionary* strongly supports Petitioners. *See* Pet. App. 24a-26a (Thacker, J., dissenting). As the dissenting opinion explained, modern editions of *Black's Law Dictionary* cleanly distinguish between statutes of limitations and statutes of repose. *See id.* The 1979 edition, published seven years before § 9658's enactment, had not fully adopted the modern definitions, and so still viewed statutes of limitation as a subset of statutes of repose. *See Black's Law Dictionary* 835 (5th ed. 1979) ("Statutes of limitation are statutes of repose."). Yet the converse was not true. That is, by 1979 the phrase "statutes of limitation" already had a specific meaning: it encompassed laws "declaring that no suit shall be maintained on such causes of action . . . unless brought within a specified period of time *after the right accrued*." *Id.* (emphasis added). That specific meaning excluded what we would now call statutes of repose.

3. Finally, Respondents assert that aspects of § 9658's legislative history treated the terms "statute of repose" and "statute of limitations" interchangeably. *See* Br. in Op. 18. Even assuming that legislative history could overcome clear statutory text, *but see Milner v. Department of Navy*, 131 S. Ct. 1259, 1266 (2011) ("We will not . . . allo[w] ambiguous legislative history to muddy clear statutory language."); *Exxon Mobil Corp. v. Allapattah Services, Inc.*, 545 U.S. 546, 568 (2005) (explaining that a legislature's "authoritative statement is the statutory text, not the legislative history"); *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."), the sources that Respondents identify actually undercut their position. Indeed, Respondents once more ignore the cogent analysis of the dissenting judge below. *See* Pet. App. 31a-32a (Thacker, J., dissenting). According to Respondents, a Study Group Report influenced the House Report and, ultimately, the drafting of § 9658. *See* Superfund Section 301(e) Study Group, 97th Cong., *Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies* (Comm. Print 1982). Yet the Study Group Report advanced distinct proposals for "statutes of limitations" and for "statutes of repose." *See id.* at 24-42. Indeed, the Study Group Report proposed a special discovery rule for statutes of limitation, but the complete *elimination* of statutes of repose. *See id.* Congress adopted the first of these recommendations while rejecting the second. Thus, the Report "put Congress on notice that statutes of limitations are distinct time-bars, separate from statutes of repose."

Pet. App. 32a (Thacker, J., dissenting). Respondents' recourse to legislative history only reconfirms the distinction between statutes of limitations and statutes of repose.

IV. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE QUESTION PRESENTED

Finally, certiorari is particularly appropriate because this case presents an ideal vehicle to resolve the question presented. Indeed, there is no dispute that the question presented is outcome-determinative, and that Respondents' suit may proceed *only if* the decision below correctly interpreted § 9658 to preempt N.C. Gen. Stat. § 1-52(16). Further, there is no dispute that N.C. Gen. Stat. § 1-52(16) is a statute of repose, not a statute of limitations. *See* Pet. App. 10a, 19a, 38a, 44a; *see also Wilson v. McLeod Oil Co.*, 398 S.E.2d 586, 597 (N.C. 1990) *Neblett v. Hanover Inspection Serv., Inc.*, No. COA06-1676, 2007 WL 2701349, at *4 (N.C. Ct. App. Sept. 18, 2007) (same). Respondents' appeal in the Fourth Circuit addressed only the question presented.

Respondents do not dispute the advantages of granting review in this case. Nor do Respondents identify any vehicle problems. Instead, Respondents suggest that this case is "not a perfect vehicle" because it "is only one part of a long-running dispute." Br. in Opp. 22. Surely, that is true of every case this Court agrees to hear. It does not answer the "when to hear the matter" question. Typically, that time comes when the dispute is sufficiently crystallized and all relevant sides have been aired. Indeed, that moment frequently comes with splits shallower and

less mature than this one. *See, e.g., Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2165 (2012) (identifying a two-year-old, 1-1 split); *Chase Bank USA, NA v. McCoy*, 131 S. Ct. 871, 877 (2011) (also identifying a two-year-old, 1-1 split). Here, with two courts going one way, two the opposite, and a dissent in this case crossing over to the opposing territory, not to mention myriad district courts in deep and protracted confusion, no beneficial purpose would be served by waiting any longer.

Finally, as a last gasp, Respondents indicate that another case with this issue is working its way through the lower courts and speculate that it could potentially address the question presented here. *See* Br. in Opp. 22. Again, surely, that's always the case when this Court grants certiorari. But while Respondents clearly have good reason to hope that this Court waits for another case, they have not shown why any other vehicle either would or could be superior to this one. And even if another court of appeals *did* address the question presented, that would only make the split even deeper, thereby providing even more reason for this Court's review, with precious months or years lost, and attendant multi-million dollar uncertainty, left to reign in the meantime. Nothing recommends that course.

CONCLUSION

The petition for a writ of certiorari should be granted.

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